

A Shanta Holdings Sdn Bhd v Golden Uni-Consortium

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02–23 OF
2007(S)

B ARIFIN ZAKARIA, AUGUSTINE PAUL AND ZULKEFLI FCJJ
24 JANUARY 2008

C *Companies and Corporations — Shares — Acquisition of shares — Notice pursuant to s 180(3) of Companies Act 1965 — Whether dissenting shareholder had three months to issue notice under s 180(3)(b) of Companies Act 1965 — Whether transferee company could apply to court before issuance of notice by dissenting shareholder*

D *Companies and Corporations — Shares — Acquisition of shares — Section 180(1) of Companies Act 1965 — Whether fundamentally different from s 180(3) of Companies Act 1965 — When s 180(1) of Companies Act 1965 applicable*

E *Companies and Corporations — Shares — Acquisition of shares — Section 180(3) of Companies Act 1965 — Whether notice pursuant to s 180(3) of Companies Act 1965 a condition precedent before action could be initiated — Whether action initiated null and void*

G The respondent acquired 90.01% of the shares in a company named Aumkar Plantations Sdn Bhd. The appellant is the shareholder of the balance of 9.99% shares in the said company. The sale and transfer of the 90.01% shares in the company to the respondent was completed on 30 June 2005. The respondent subsequently served a notice on the appellant pursuant to s 180(3) of the Companies Act 1965 ('the Act'). Four days after issuing the notice, the respondent took out an Originating Summons in the High Court praying, inter alia, for a declaration that the respondent is entitled to acquire the appellant's shares of 9.99% in the company. High Court granted order in terms of the application and further ordered that the terms and conditions for the acquisition shall be the same as the acquisition of the 90.01% shares.

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I The Court of Appeal agreed with the High Court's decision and dismissed the appellant's appeal. The appellant was granted leave to appeal to the Federal Court on the following questions of law: (1) are the provisions of s 180(3) of the Act fundamentally different from the provisions of s 180(1) of the Act? (2) whether the dissenting shareholder had three months to issue

the notice as prescribed in s 180(3)(b) and whether such notice is a condition precedent before the transferee company is entitled to make application to the court in terms of s 180(3) of the Act? (3) Having regard to the true meaning and/or legal effect of s 180 (3) of the Act, is an action or legal proceedings, filed in court in contravention of the conditions precedent prescribed in s 180(3) of the Act render such action or legal proceedings a nullity?

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Held, allowing the appeal:

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- (1) Section 180(1) of the Act covers the situation where nine-tenths of the shareholders of the transferor company have approved and accepted the offer by the transferee company. Subsequent thereto, the transferee company may, at any time within two months after the offer has been so approved, give notice to the dissenting shareholders of their desire to acquire his share. And within one month of such notice the dissenting shareholder may apply to court to resist such acquisition (see paras 10 & 14).

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- (2) In contrast s 180(3) of the Act covers the situation where the shares of the consenting majority, equivalent to nine-tenths in total value, had already been transferred to the transferee company. In that event it becomes incumbent upon the transferee company to give notice of that fact to the dissenting shareholder within one month from the date of the said transfer (see para 10).

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- (3) The transferee company had no right to acquire the shares of the dissenting shareholders of the transferor company unless and until notice was given by the dissenting shareholder under para (b) of s 180(3) of the Act (see para 13).

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- (4) The meaning to be ascribed to the provisions of s 180(3)(b) of the Act is that upon the giving of the notice by the transferee company under s 180(3)(a) of the Act, the dissenting shareholder may within three months from that date give notice to the transferee company to require it to acquire its shares in the transferor company. The right to give notice under s 180(3)(b) of the Act is expressly conferred upon the dissenting shareholder and not on the transferee company (see para 17).

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- (5) Upon the receipt of the notice in Form 58, the appellant has the right to decide whether or not to issue a notice under s 180(3)(b) of the Act to require the respondent to acquire its shares in the transferor company. It can exercise this right within the period of three months from the date of the Form 58 Notice. The respondent has no such right (see para 20).

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- A (6) The application to the court only arises when the parties could not reach an agreement on the terms of the acquisition of the shares by the transferee company. This disagreement, however, could only arise following the giving of a notice under s 180(3)(b) of the Act. Without such a notice having been given there could not arise any dispute and hence the issue of an application to court for determination of the price does not arise. (see para 22)
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- (7) No application could properly have been made to the court under s 180(3) of the Act. It followed that whatever order was made by the court pursuant to the said application was null and void and was of no effect and force, and might be set aside *ex debito justitiae* (see para 23).
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[Bahasa Malaysia summary]

- D Responden memperolehi 90.01 % dari saham syarikat bernama Aumkar Plantations Sdn Bhd. Perayu adalah pemegang saham lebih 9.99% dari syarikat tersebut. Penjualan dan pemindahan 90.01 % saham dalam syarikat tersebut kepada responden diselesaikan pada 30 Jun 2005. Responden kemudiannya mengeluarkan satu notis kepada perayu menurut s 180(3) Akta Syarikat 1965 ('Akta'). Empat hari setelah mengeluarkan notis tersebut,
- E responden mengeluarkan saman pemula di Mahkamah Tinggi menuntut inter alia, untuk satu deklarasi di mana responden adalah berhak untuk memperolehi saham perayu sebanyak 9.99% dalam syarikat. Mahkamah Tinggi meluluskan perintah berkenaan permohonan tersebut dan seterusnya memerintahkan terma dan syarat untuk pemerolehan adalah sama dengan pemerolehan saham sebanyak 90.01% itu. Mahkamah Rayuan bersetuju dengan keputusan Mahkamah Tinggi dan mengenyepikan rayuan perayu. Perayu telah diberi kebenaran untuk merayu di Mahkamah Persekutuan berpandukan persoalan undang-undang berikut: (1) adakah provisi s 180(3) dari Akta secara asasnya berlainan dengan provisi s 180(1) dari Akta? (2) sama ada pemegang saham yang menentang mempunyai tiga bulan untuk mengeluarkan notis seperti tertera dalam s 180(3)(b) dan samada notis tersebut adalah satu syarat sebelum syarikat penerima pindahan berhak membuat permohonan kepada mahkamah berkenaan s 180(3) Akta berkenaan; (3) setelah mengambil kira maksud sebenar dan /atau kesan undang-undang s 180(3) Akta tersebut, adakah perbuatan atau prosiding undang-undang, yang difailkan di mahkamah yang bercanggah dengan syarat-syarat terdahulu yang tertera dalam s 180(3) Akta tersebut menyebabkan perbuatan atau prosiding undang-undang tersebut satu pembatalan?
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Diputuskan, membenarkan rayuan:

- (1) s 180(1) Akta tersebut meliputi situasi di mana sembilan persepuluh

- dari pemegang saham syarikat pemindah telah meluluskan dan menerima tawaran oleh syarikat pemindahmilik. Berikutan dari itu, syarikat pemindahmilik boleh, dari masa ke semasa dalam tempoh dua bulan selepas tawaran diluluskan, memberi notis kepada pemegang saham penentang akan hasrat mereka untuk memperolehi saham beliau. Dan dalam masa satu bulan dari notis tersebut pemegang saham penentang boleh memohon kepada mahkamah untuk menentang pemerolehan tersebut (lihat perenggan 10 & 14). A B
- (2) Secara kontras s 180 (3) Akta tersebut meliputi situasi dimana majoriti yang menurut, bersamaan dengan sembilan persepuluh dari jumlah nilai, telah dipindah ke syarikat pemindahmilikan. Dalam keadaan itu ia menjadi kewajipan ke atas syarikat pemindahmilikan untuk memberi notis akan fakta tersebut kepada pemegang saham melawan dalam masa sebulan dari tarikh pemindahan tersebut (lihat perenggan 10). C
- (3) Syarikat pemindahmilikan tidak mempunyai hak untuk memiliki saham pemegang saham penentang kepunyaan syarikat pemindah kecuali dan sehingga notis diberi oleh pemegang saham penentang dibawah perenggan (b) s 180(3) Akta tersebut (lihat perenggan 3). D
- (4) Maksud yang boleh dianggap dari provisi s 180(3) Akta tersebut ialah setelah menyerahkan notis oleh syarikat pemindahmilikan dibawah s 180(3)(a) Akta tersebut, pemegang saham penentang boleh dalam masa tiga bulan dari tarikh tersebut, memberi notis kepada syarikat pemindahmilikan untuk mengkehendakinya mendapatkan saham dalam syarikat pemindah. Hak untuk memberi notis dibawah s 180(3)(b) Akta tersebut adalah secara jelas diberikan keatas pemegang saham penentang dan bukan keatas syarikat pemindahmilikan (lihat perenggan 17). E F
- (5) Setelah menerima notis dalam Borang 58, perayu mempunyai hak untuk memutuskan atau tidak untuk mengeluarkan isu dibawah s 180(3)(b) Akta tersebut untuk mengkehendaki responden untuk memiliki saham dalam syarikat pemindah. Ia boleh menjalankan hak ini dalam tempoh masa tiga bulan dari tarikh dalam notis Borang 58. Responden tidak mempunyai hak sedemikian (lihat perenggan 20). G
- (6) Permohonan kepada mahkamah hanya timbul apabila pihak-pihak tidak mencapai persetujuan dalam terma-terma pemerolehan saham oleh syarikat pemindahmilikan. Percanggahan ini, walau bagaimanapun hanya boleh timbul berikutan pemberian notis di bawah s 180(3)(b) Akta. Tanpa pemberian notis tersebut tidak akan timbul sebarang percanggahan dan seterusnya isu permohonan kepada mahkamah untuk menentukan harga tidak akan timbul (lihat perenggan 22). H I
- (7) Tiada permohonan dapat dibuat dengan betul kepada mahkamah di bawah s 180(3) Akta tersebut. Ia menurut di mana apa sahaja

- A perintah mahkamah lanjutan dari permohonan tersebut adalah terbatal dan tidak sah dan tidak mempunyai kesan dan, dan boleh diketepikan *ex debito justitiae* (lihat perenggan 23).]

Notes

- B For cases on shares generally, see 3(1)*Mallal's Digest* (4th Ed, 2006 Reissue) paras 812–944.

Cases referred to

- C *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 (refd)
Badiaddin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1MLJ 393 (refd)
Majlis Peguam Malaysia & Ors v An Kong Weng Joseph [1993] 2 MLJ 57 (refd)
Sri Bangunan Sdn Bhd v Majlis Perbandaran Pulau Pinang & Anor [2007] 6 MLJ 581 (refd)
D *Western Manufacturing (Reading) Ltd, Re* (1956) (refd)

Legislation referred to

- E Companies Act 1965 ss 180(1), (3), (3)(b)
Companies Act 1948 [UK] s 209(2)
Ronny Cham (Rosslyn Peter Rosen with him (Ting Rosen & Co)) for the appellant.
Jeyan TM Marimuttu (J Marimuttu & Partners) for the respondent.

- F **Arifin Zakaria FCJ (delivering judgement of the court):**

Background

- G [1] This is an appeal against the decision of the Court of Appeal dismissing the appeal by the appellant against the decision of the High Court Sabah and Sarawak at Tawau. The following three questions of law based on the Companies Act 1965 ('the Act') were posed to this court:
- H (1) are the provisions of s 180(3) of the Act fundamentally different from the provisions of s 180(1) of the Act?
- I (2) whether the dissenting shareholder has 3 months to issue the notice as prescribed in s 180(3)(b) and whether such notice is a condition precedent before the transferee company is entitled to make application to the court in terms of s 180(3) of the Act?
- (3) having regard to the true meaning and/or legal effect of s 180(3) of the Act, is an action or legal proceedings, filed in court in contravention of the conditions precedent prescribed in s 180(3) of the Act render such action or legal proceedings a nullity?

The memorandum of appeal is at pp 7–10 of the appeal record.

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THE FACTS

[2] Prior to going into the issues raised before us it is first necessary to set out the facts relevant to the consideration of these issues. They were not in dispute, and briefly are as follows:

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[3] The respondent is a company incorporated on 14 February 2005 under the Act. It was incorporated with the sole purpose of acquiring the whole of the paid up ordinary shares in Aumkar Plantations Sdn Bhd ('the transferor company'). The transferor company has an authorized share capital of RM50,000,000 divided into 50,000,000 ordinary shares of RM1 each, of which 30,500,000 shares have been issued and fully paid up. A total of 3,046,485 of those shares were held by the appellant, constituting 9.99% of the fully paid up ordinary shares of the transferor company.

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[4] On 10 January 2005, one Heinz Fochem, on behalf of the respondent, made a conditional offer to acquire the whole of the fully paid up ordinary shares of the transferor company.

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[5] At the Extra Ordinary General meeting of the transferor company, held on 21 February 2005, 90.01% of the shareholders voted to accept the offer. A without prejudice offer to sell 9.99% of the shares held by the appellant was made to the respondent on 9 March 2005 but this was not taken up by the respondent.

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[6] The sale and transfer of 90.01% shares of the transferor company to the respondent was completed on 30 June 2005. Subsequently, the respondent through its solicitors by a letter dated 30 June 2005, served on the appellant a notice pursuant to s 180(3) of the Act.

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[7] On 4 July 2005, ie four days after issuing the said notice, the respondent took out an originating summons in the High Court at Tawau praying, inter alia, for a declaration that the Respondent is entitled to acquire the appellant's shares of 9.99% in the transferor company. An order in terms of the said prayer was granted by the High Court. The High Court further ordered that the terms and conditions for the acquisition shall be the same as the acquisition of 90.01% shares of the transferor company by the respondent.

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[8] On appeal the Court of Appeal agreed with the findings and decision of the High Court and hence this appeal.

A THE QUESTIONS BEFORE US

Questions (1) and (2)

B [9] We propose to deal with questions (1) and (2) together as they are interrelated. They turn on the interpretation of subsections (1) and (3) of s 180 of the Act which for convenience are reproduced below:

C 180. Power to acquire shares of shareholders dissenting from scheme or contract approved by majority

D (1) Where a scheme or contract involving the transfer of all of the shares or all of the shares in any particular class in a company (in this section referred to as the 'transferor company') to another company or corporation (in this section referred to as the 'transferee company') has within four months after the making of the offer in that behalf by the transferee company been approved as to the shares or as to each class of shares whose transfer is involved by the holders of not less than nine-tenths in nominal value of those shares or of the shares of that class (other than shares already held at the date of the offer by, or by a nominee for, the transferee company or its subsidiary), the transferee company may at any time within two months after the offer has been so approved give notice in the prescribed manner to any dissenting shareholder that it desires to acquire his shares and when such a notice is given the transferee company shall, unless on an application made by the dissenting shareholder within one month from the date on which the notice was given or within seven days of a statement being supplied to a dissenting shareholder pursuant to subsection (2) (whichever is the later) the Court thinks fit to order otherwise, be entitled and bound to acquire those shares on the terms which, under the scheme or contract the shares of the approving shareholders are to be transferred to the transferee company or if the offer contained two or more alternative sets of terms upon the terms which were specified in the offer as being applicable to dissenting shareholders.

H (2) (not relevant)

I (3) Where in pursuance of any such scheme or contract, shares in a company are transferred to another company or its nominee and those shares together with any other shares in the first mentioned company held by, or by a nominee for, the transferee company or its subsidiary at the date of the transfer comprise or include nine-tenths in nominal value of the shares in the first-mentioned company or of any class of those shares, then

(a) the transferee company shall within one month from the date of the transfer (unless on a previous transfer in pursuance of the scheme or contract it has already complied with this requirement) give notice of that fact in the prescribed manner to the holders of the remaining shares or of the remaining shares of that class who have not assented to the scheme or contract; and

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(b) any such holder may within three months from the giving of the notice to him require the transferee company to acquire the shares in question,

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and where shareholder gives notice under para (b) with respect to any shares, the transferee company shall be entitled and bound to acquire those shares on the terms on which under the scheme or contract the shares of the approving shareholders were transferred to it, or on such other terms as are agreed or as the Court on the application of either the transferee company or the shareholder thinks fit to order.

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[10] It would appear that under the scheme of the Act, s 180(1) of the Act covers the situation where nine-tenths of the shareholders of the transferor company have approved and accepted the offer by the transferee company. Subsequent thereto, the transferee company may, at any time within two months after the offer has been so approved, give notice to the dissenting shareholders of their desire to acquire his share. And within one month of such notice the dissenting shareholder may apply to court to resist such acquisition. If no application is made to the court by the dissenting shareholder, the transferee company shall be entitled and bound to acquire the dissenting shareholder's shares on the same terms and conditions as the approving shareholders. In this case no such notice was ever given by the transferee company under s 180(1) of the Act. Therefore, the said section would not apply.

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[11] In contrast s 180(3) of the Act covers the situation where the shares of the consenting majority, equivalent to nine-tenths in total value, had already been transferred to the transferee company. In that event it becomes incumbent upon the transferee company to give notice of that fact to the dissenting shareholder within one month from the date of the said transfer. The words 'that fact' here refers to the transfer of nine-tenths of the shares in the transferor company. The said notice must be in Form 58. Upon issuance of the said notice the dissenting shareholder may, within three months, give notice to the transferee company requiring it to acquire the entire shares in the hands of the dissenting shareholders. The purpose behind the said provision is explained in *Weinberg and Blank on Take-Overs and Mergers*, 4th Ed at para 1403 p 334:

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- A In view of the fact that the position of a small minority in a subsidiary company may be 'anything but satisfactory,' the Cohen Committee felt that minority shareholders locked in as a result of a scheme or contract in terms of which the offeror company had acquired 90 per cent or more of the shares or shares of a class should have a corresponding right to compel the offeror company to acquire their shares. This recommendation is embodied in what is now s 209(2).
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- [12] The section referred to here is s 209(2) of the English Companies Act 1948, which is the equivalent of our s 180(3) of the Act. Therefore, under s 180(3) of the Act the appellant as the dissenting shareholder is given a period of three months to consider whether to exercise its right under the said section to require the transferee company to acquire its shares in the transferor company or not. This is stated in clear terms in the Form 58 Notice itself, the relevant part of which reads as follows
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- D In pursuance of those provisions you may, within three months from the giving of this notice, give notice that you require the transferee company to acquire your holding of ... shares in the transferor company, and if you give that notice the transferee company will be entitled and bound to acquire those shares on the terms on which under the scheme or contract the shares of the approving shareholders were transferred to it, or on such other terms as are agreed or as the High Court on application made to it by you or by the transferee company thinks fit to order.
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Thus, under s 180(3) of the Act the dissenting shareholder may require the transferee company to acquire its shares in the transferor company.

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- [13] Once the dissenting/non assenting shareholder gives notice under the said section, the transferee company shall be entitled and bound to acquire those shares on the terms on which under the scheme or contract the shares of the approving shareholders were transferred to it. Therefore, in this regard, we agree with the submission of learned counsel for the appellant that the transferee company has no right to acquire the shares of the dissenting shareholders of the transferor company unless and until notice is given by the dissenting shareholder under para (b) of s 180(3) of the Act.
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- [14] Before us learned counsel for the respondents, En Jeyan Marimuttu, contended that such a notice had been given. But when we asked him to produce the said notice he was unable to do so except to point to a letter dated 9 March 2005 from the appellant's solicitor to the transferor company wherein the appellant company made an offer to the respondent for the sale of their shares at RM5.50 per share. He contended that the said letter indicates that the appellant was always willing to sell its shares to the respondent. Likewise he said that the respondent was always willing to purchase the said shares. The only disagreement was over the price.
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[15] The Court of Appeal agreed with the submission of the respondent as is apparent from the following passage from the judgment of the Court of Appeal which reads as follows:

In short, the respondent here was ready and willing to acquire the appellant's shares. On the part of the appellant, the appellant was also prepared to part with its shares except at a higher price, which of course will be settled by the Court when there is a disagreement over it. This willingness of the appellant for the respondent to acquire its shares is reflected in the appellant's solicitors' letter to the transferor company on 9 March 2005 where it asked for RM5.50 per share. This was subsequently reaffirmed by the appellant when the appellant gave a counter notice to the respondent to acquire its shares. Though this was given without prejudice to this appeal and subsequent to the application of the respondent but before the expiry of the 3 month period mentioned in s 180(b) Companies Act, the fact remains that the appellant was desirous of the respondent to acquire its shares. These, in my opinion, clearly imply that the appellant had from the very beginning to the end of the 3 month period after the notice by the respondent under s 180(3)(a) of the Companies Act, intended and had notified the respondent to acquire its minority shares in the transferor company. The technical objection now raised by the appellant that the respondent should have delayed in filing its application is, to my mind, an attempt to extract from the respondent the price insisted on by the appellant for its shares.

Thus, it would appear that both in the High Court and the Court of Appeal the requirement of a notice under para (b) of s 180(3) of the Act was never considered. It was brushed aside as being irrelevant. The Court of Appeal was of the view that the offer made by the appellant through its solicitor's letter of 9 March 2005 and subsequently reaffirmed by the appellant when the appellant gave a counter notice to the respondent to acquire its shares was sufficient notice for the purpose of para (b) of s 180(3) of the Act.

[16] Learned counsel for the appellant contended before us that the provisions of s 180(3) of the Act have to be strictly complied with before the majority shareholder can exercise its right under the section. We are of the view that the words of s 180(3) of the Act are plain.

[17] In our opinion the meaning to be ascribed to the provisions of s 180(3)(b) of the Act is that upon the giving of the notice by the transferee company under s 180(3)(a) of the Act the dissenting shareholder may within three months from that date give notice to the transferee company to require it to acquire its shares in the transferor company. The right to give notice under s 180(3)(b) of the Act is expressly conferred upon the dissenting shareholder and not on the transferee company. This is fortified by the use of the words 'such holder' in s 180(3)(b) of the Act which is clearly a reference to the dissenting shareholder. Where such notice is issued by the dissenting shareholder, within the prescribed time, then and only then, the transferee company will be entitled and bound to acquire those shares on the terms on

A which under the scheme or contract the shares of the approving shareholders were transferred to it. It cannot be gainsaid that s 180(3) of the Act creates rights and obligations on both parties thereby requiring a strict interpretation. As was held by the Supreme Court in *Majlis Peguam Malaysia & Ors v An Kong Weng Joseph* [1993] 2 MLJ 57 in general principle, where
B a statute regulates the exercise of a right or power or the use of a prescribed procedure, with express reference to time being made, there is a marked inclination of the court to regard the relevant provision as one which must be strictly and meticulously followed. We are duty bound to give effect to the meaning of the section. In this regard reference may be made to the
C observation of Higgins J in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at pp 161–162, cited with approval by this court in *Sri Bangunan Sdn Bhd v Majlis Perbandaran Pulau Pinang & Anor* [2007] 6 MLJ 581C at p 592::

D The fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded according to the intent of the Parliament that made it, and that intention has to be found by an examination of the language used in the statute as a whole. The question is, what does the language mean; and when
E we find what the language means in its ordinary and natural sense it is our duty to obey that meaning even if we think the result to be inconvenient, impolite or improbable.

[18] In the present case, we find that no notice was ever issued by the
F appellant under s 180(3)(b) of the Act. The letter from the appellant's solicitors dated 9 March 2005 cannot constitute such a notice for the simple reason that it preceded the Form 58 Notice. Thus, in the circumstances, we agree with the appellant's submission that it is erroneous for the Court of Appeal to hold that the letter of 9 March 2005, which was written on a
G without prejudice basis, is a valid notice requiring the respondent to acquire the appellant's shares.

[19] On the question of the sufficiency of the notice, the Court of Appeal
H in its judgment cited the observation of *Wynn-Parry J in Re Western Manufacturing (Reading) Ltd* [1956] 1 Ch 436 in support of its conclusion. This is what it said:

I ...in deciding that the notice to the applicant was valid and dismissing the summons: that, in s 209(1), the phrase 'within four months after the making of the offer' did not denote a fixed period during the whole of which the offer must remain open, but described a maximum period during which the event contemplated might occur; and that it was competent to A Ltd to fix a period within, but shorter than, the four months, during which the offer must be accepted.

But that is not the issue here. The question here is whether the appellant had at any time issued a notice under s 180(3)(b) of the Act. We found no such notice had ever been issued. Hence the question of the sufficiency or otherwise of the notice does not arise.

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[20] We would therefore answer questions one and two in the following manner. Firstly we would say that on the facts of the instant case s 180(1) of the Act has no application and the relevant provision to be applied is s 180(3) of the Act. Applying the said section to the fact of this case we conclude that upon the receipt of the notice in Form 58 the appellant has the right to decide whether or not to issue a notice under s 180(3)(b) of the Act to require the respondent to acquire its shares in the transferor company. It can exercise this right within the period of three months from the date of the Form 58 Notice. The respondent has no such right.

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[21] The next question is whether the requirement of the notice under s 180(3)(b) of the Act is a condition precedent to be satisfied before the transferee company is entitled to make an application to the court in terms of s 180(3) of the Act. This forms the second part of question no (2). Under s 180(3) of the Act, once a shareholder has given a notice under para (b) of the said section the transferee company shall be entitled and bound to acquire its shares. The terms of the acquisition will be:

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- (a) similar to that on which under the scheme or contract the shares of the approving shareholders were transferred to it;
- (b) as are agreed between the parties; or
- (c) as the court thinks fit to order

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[22] Under the said section it is clear that the application to the court can be made by either the transferee company or the dissenting shareholder. But the application to the court only arises when the parties could not reach an agreement on the terms of the acquisition of the shares by the transferee company. This disagreement, however, could only arise following the giving of a notice under s 180(3)(b) of the Act. Without such a notice having been given there cannot arise any dispute and hence the issue of an application to Court for determination of the price does not arise. That answers the second part of question no (2).

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Third Question

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[23] The third and final question is the effect of an application filed in court in contravention of s 180(3) of the Act and the order made pursuant thereto. In the circumstances of this case we hold that no application could

- A properly have been made to the court under s 180(3) of the Act. It follows that whatever order was made by the court pursuant to the said application is null and void and is of no effect and force, and may be set aside *ex debito justitiae*. (see *Badiaddin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393). For the above reasons our answer to the third question
- B is in the affirmative.

CONCLUSION

- C [24] In the premises we allow this appeal with costs both here and in the courts below. The order of the High Court is accordingly set aside.

Appeal allowed with costs.

- D Reported by Brendan Navin Siva

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